87-579

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

HARRY KATZ, Appellant

v.

PEOPLE OF STATE OF NEW YORK, Appellee

ON APPEAL FROM APPELLATE TERM: FIRST DEPT.

STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Harry Katz, Appellant Pro Se

7600 Shore Front Pkwy. Suite 12L

Rockaway, N.Y. 11692

(718) 318-2563

October 1987

QUESTIONS PRESENTED

1. Whether New York Penal Law 240.30(1) is unconstitutional and violative of First Amendment free speech.

2. Whether it is constitutional for prosecutor Morgenthau, in Manhattan, to prosecute me for the jewish charity, Federation of Jewish Philanthropies of New York, hereinafter called "Federation" when he is on the Federation board of trustees, when he has falsely denied his board membership by a false sworn affidavit to the trial judge, and when prosecutor Morgenthau is taking tens of thousands of dollars in campaign contributions from Federation board members and executives, while prosecuting me for Federation.

3. Whether it is constitutional for appellant to be convicted of annoying a corporation, when it is physically

impossible to annoy a corporation.

4. Whether the fact that the prosecutor lied to the trial judge about phony precedents, which in fact did not exist, whether this renders my conviction unconstitutional.

5. Whether the fact that one of the three judges on the appellate court, that affirmed my conviction, whether the fact that one of these three judges is a member of the lawyer's division of Federation, whether that renders my appellate review of my conviction to be unconstitutional.

PARTIES

Manhattan District Attorney Robert Morgenthau
One Hogan Place N.Y. N.Y. 10013

New York State Attorney General
Robert Abrams
Capitol Albany, N.Y. 12224

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	3
HOW THE FEDERAL QUESTION WAS RAISED	4
STATEMENT OF THE CASE	4
QUESTIONS ARE SUBSTANTIAL ...	8
CONCLUSION	13
N.Y. COURT OF APPEALS DECISION ..	A-1
APPELLATE TERM DECISION	A-3
MANHATTAN CRIMINAL COURT DECISION	A-8
NOTICE OF APPEAL	A-19
AFFIDAVIT OF SERVICE FOR NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT	A-21

TABLE OF AUTHORITIES

No cases were cited.

No._____

_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

HARRY KATZ, Appellant

v.

PEOPLE OF STATE OF NEW YORK, Appellee

ON APPEAL FROM APPELLATE TERM: FIRST DEPT.

STATE OF NEW YORK

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellant Harry Katz appeals from the final judgment of the N.Y. Appellate Term: First Department, dated July 9, 1987, which affirmed appellant's conviction, on March 6, 1985, in Manhattan Criminal Court, for aggravated harassment, P.L. 240.30(1), against the corporation, Federation of Jewish Philanthropies, hereinafter called "Federation".

OPINIONS BELOW

To the best of my knowledge, the opinions of the courts below are not reported, in the reporters, but they are reprinted in the appendix hereto on pages A-1, A-3, and A-8, infra.

JURISDICTION

The Certificate denying leave to appeal to the N.Y. Court of Appeals is dated August 20, 1987 (A-1). Notice of Appeal to this Court was duly filed in the New York Criminal Court, Appellate Term: First Dept. and N.Y. Court of Appeals on October 8, 1987 (A-19). This case, I believe, is subject to the notification requirement of 28 USC Sec. 2403(b). This appeal is docketed within 90 days from the entry of judgment below. Jurisdiction of this Court rests on 28 USC Sec. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment # 1:

Congress shall make no law..... or abridging the freedom of speech

U.S. Constitution Amendment # 14

nor shall any State deprive any person of life, liberty or property, without due process of law

New York State Penal Law 240.30(1)

240.30 Aggravated harrassment in the second degree:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he:

(1) Communicates or causes a communication to be initiated by mechanical or electronic means or otherwise, with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any

other form of written communication, in a manner likely to cause annoyance or alarm; or

HOW THE FEDERAL QUESTION WAS RAISED

The five federal questions are listed on page "i" supra. The first three of these questions were presented to the Criminal Court judge, Appellate Term judges, and the N.Y. State Court of Appeals.

The fourth and fifth questions were raised only to the N.Y. Court of Appeals, because I had become aware of these issues at that time.

STATEMENT OF THE CASE

Manhattan District Attorney Robert Morgenthau prosecuted Harry Katz, for Penal Law 240.30(1), or aggravated harassment of the corporation, Federation of Jewish Philanthropies, hereinafter

called "Federation". The crime of Penal Law 240.30(1) means that the criminal defendant annoys the complainant.

Obviously, it is impossible to annoy a corporation. And here, where prosecutor Morgenthau, was on the board of trustees of Federation, perjuriously denied by sworn affidavit that he was on the board of Federation, and where prosecutor Morgenthau was taking thousands of dollars in campaign contributions from Federation, while prosecuting me for Federation, here there are important due process questions.

Trial judge Frank Diaz said that he was going to throw out the charges against me, because it was impossible to annoy a corporation, but after the prosecutor lied about three phony precedents, which were all untrue, the trial judge changed his mind

and I became the only one in world history convicted of annoying a corporation. When my case was affirmed by the state Appellate Term, one of the three judges on that Court was Judge Stanley Ostrau, who is a member of the lawyer's division of Federation.

Both Judge Ostrau, and his wife, are actively involved with Federation, and so when the Appellate Term affirmed my conviction, one of the three judges had a flagrant conflict of interest.

In the entire criminal complaint, it is alleged that I called the complainant, the corporation, Federation, only <u>one</u> time, and that a Mr. Kahn willingly took the call, after it was screened by his secretary. In the complaint it is alleged that I spoke only these words, "all out war against the UJA" and "all the anti-semites in

America could not create the kind of trouble for Jews". If my adversaries try to represent to this Court that it was ever alleged that I called more than one time, or spoke any more than these few words that I just quoted, then my adversaries would be misleading this Court.

Obviously, one phone call to the complainant, Federation, and speaking these few words to a willing listener, Mr. Kahn, who willingly took the call after it was screened by his secretary, obviously this is speech protected by the First Amendment.

The constitutionality of my conviction is an issue that I raised to the trial court and both appellate courts. The prosecutor's conflicts of interest were raised to the trial court and both appellate courts.

THE QUESTIONS ARE SUBSTANTIAL

My conviction in the Manhattan Criminal Court is unprecedented in a number of ways, and repugnant to the constitution:

I am the only person in world history ever convicted of annoying a corporation. The trial judge, Judge Frank Diaz, said that he was going to throw out the case because it was impossible to annoy a corporation. Only after the prosecutor lied about phony precedents did the judge change his mind, and not throw out the case. Prosecutor Morgenthau was on the board of the complainant corporation, Federation, and he was taking thousands of dollars in campaign contributions from Federation board members and executives, while prosecuting me for Federation.

The assistant prosecutor gave the

trial judge a perjured affidavit denying that prosecutor Morgenthau was on the Federation board of trustees.

It is alleged that I called the complainant, one time, and spoke to a willing listener, who took the call after it was screened by his secretary.

Obviously, this is protected free speech that is protected by the First Amendment, and Penal Law 240.30(1) is unconstitutional.

One of the three appellate judges who affirmed my conviction had a flagrant conflict of interest in that Judge Stanley Ostrau, of the Appellate Term, is a member of the lawyer's division of Federation, and both he and his wife are active members of Federation.

So this appellant, Harry Katz, was convicted of aggravated harassment of the corporation, Federation, even

though it is impossible to annoy a corporation, even though the prosecutor was on the board of the complainant corporation, which he perjuriously denied by sworn affidavit to the trial judge, even though the prosecutor was taking thousands of dollars in campaign contributions from the corporation, and even though appellant's one and only phone call to Federation involved protected free speech.

In the entire criminal complaint, it is alleged that I called the complainant, the corporation, Federation, one time, and that I spoke the few words that I quoted, supra, to a willing listener, who willingly took my call after the call was screened by his secretary. This is protected free speech, protected by the First Amendment, and N.Y. Penal Law 240.30(1)

is clearly violative of First Amendment free speech.

When you consider that the prosecutor perjuriously denied, by sworn affidavit to the trial judge, that he was on the board of trustees of the complainant corporation, Federation, and that the prosecutor lied to the trial judge about three phony precedents that did not exist, it is clear that my Fourteenth Amendment due process rights were violated.

While prosecuting me for the corporate complainant, Federation, prosecutor Morgenthau was on the board of trustees of Federation, and prosecutor Morgenthau was taking thousands of dollars in campaign contributions from Federation board members and executives.

One of the three judges on the

appellate court that affirmed my conviction, Judge Stanley Ostrau, is a member of the lawyer's division of Federation, and so this judge had a flagrant conflict of interest.

I, Harry Katz, the appellant, am the only person in world history ever convicted of annoying a corporation, and it is obvious that it is impossible to annoy a corporation. Only a human person can be annoyed, and not a corporation. Obviously, this conviction violates First Amendment free speech and fourteenth amendment due process.

CONCLUSION

Appellant urges this Court to note probable jurisdiction in this case and set the matter for full briefing and oral argument.

Because I am a nonattorney pro se, this statement may not be as polished as a jurisdictional statement prepared by an attorney.

However, I think that the reader can see that my conviction, and the conflicts of interest of the prosecutor and one appellate judge, render my conviction tainted and repugnant to both the concepts of free speech and due process, and I pray that this Court will note probable jurisdiction.

Respectfully submitted,

Tel: (718) 318-2563

Harry Katz Pro Se
7600 Shore Front Pkwy.
Rockaway, N.Y. 11692
Suite # 12L

APPENDIX

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. RICHARD D. SIMONS

ASSOCIATE JUDGE

CERTIFICATE DENYING LEAVE

THE PEOPLE OF THE STATE OF NEW YORK

RESPONDENT

AGAINST

HARRY KATZ

APPELLANT

ORDER

I, Richard D. Simons, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals

and permission to appeal is hereby denied.

Dated at Rome, New York

August 20, 1987

/s/

Richard D. Simons

Associate Judge

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 9th day of July 1987

APPELLATE TERM OF THE SUPREME COURT
FIRST DEPARTMENT DECEMBER 1986

PRESENT: HON. THOMAS J. HUGHES, P.J.
HON. XAVIER C. RICCOBONO
HON. STANLEY S. OSTRAU

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

-against-

HARRY KATZ #86-313

Defendant-Appellant.

Defendant appeals from a judgment of conviction of the Criminal Court, New York County, rendered August 7, 1985 after a jury trial (Diaz, J.) convicting him of aggravated harrassment in the

second degree (Penal Law Sec. 240.30) and sentencing him to a fine of $500 or a term of ninety days. The fine has been paid.

PER CURIAM

Judgment of conviction rendered August 7, 1985 (Diaz, J.) affirmed.

We find that a corporation may be the subject and victim of aggravated harrassment in the second degree under Penal Law Sec. 240.30. That statute provides in relevant part: A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he: 1. Communicates, or causes a communication to be initiated by mechanical or electronic means, or otherwise, with a person, anonymously or otherwise, by telephone ... in a manner likely to cause annoyance or alarm; or

2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication[.]

The prosecution established,. beyond a reasonable doubt, a course of conduct consisting of a barrage of threatening telephone calls by defendant to corporate officers of the Federation of Jewish Philanthropies, made at all hours of the day and night at their homes and offices, intended to influence the corporation's decision-making process as regards employment within its beneficiary agencies, in which defenant demanded that a certain employee be fired on pain of a campaign by defendant to impair the Federation's ability to carry out its charitable function. Defendant's words and actions exceeded the bounds of legitimate communication and constituted harassment, or so a jury

could reasonably find. A corporation may be the object of extortionate or coercive threats (People v. Lamm, 292 NY 224; United States v. Lewis 797 F. 2d 358), and in the situation where repeated telephone threats are directed to corporate officers in their official capacities concerning corporate affairs, it is fair to conclude that the corporation itself has been disrupted or harassed. Hence, it is appropriate that a corporation, as well as an individual, be construed as a "person" within the intendment of the statute (Penal Law Sec. 10.00, subd.7).

As to defendants argument that he was not tried upon a proper accusatory instrument, it is evident from the trial minutes that defendant's counsel made a knowing election to proceed to a determination on the merits and ratified

the procedure adopted by the court for for conversion of the complaint to an information (See People v. Conner, 63 NY2d 11).

Defendant's appellate argument that the statute is void for vageness was not raised below and is, in any event, unavailing (People v. Smith, 89 Misc. 2d 789; cf. People v. Dupont, 107 AD2d 247).

/s/

Justice Hughes

Justice Riccobono

Justice Ostrau

CRIMINAL COURT OF THE CITY OF NEW YORK

NEW YORK COUNTY: PART AP 17

THE PEOPLE OF THE STATE OF NEW YORK

-against- Docket # 4NO83341

HARRY KATZ

Defendant

Diaz, J.:

By a felony complaint dated October 20, 1984 the defendant, Harry Katz, was charged with attempted coercion in the first and second degrees (Penal Law Secs. 110/135.65 and 110/135.60), harassment (P.L. Sec. 240.25) and aggravated harassment in the second degree (P.L. Sec. 240.30). On January 9, 1985 the People dropped the felony charge (attempted coercion in the first degree) and filed corroborating affidavits in connection with the remaining charges which were all misdemeanors.

On February 26, 1985, the case was

referred to the undersigned for a jury trial. Before selection of the jury, the People's motion to dismiss the charge of harrassment (P.L. Sec.240.25) was granted and the defendant proceeded to trial charged with attempted coercion in the second degree and aggravated harassment. Shortly after the trial had commenced and the first witness had testified, it was discovered that the corroborating affidavits filed on January 9, 1985 had not been properly verified as required by CPL 100.30. Thereafter, at the defendant's suggestion, the remaining witnesses (the individuals who allegedly had received the telephone calls detailed in the felony complaint) signed verified corroborating affidavits just before they testified. On March 6, 1985 the jury found the defendant guilty of aggravated harassment but not guilty of attempted coercion in the second degree.

Citing numerous grounds, the defendant has moved pursuant to CPL 330.30 to set aside the verdict. For purposes of this opinion, these grounds will be discussed as falling under various categories.

I. Constitutionality of P.L. 240.30

Relying on People v Dupont (N.Y.L.J. 3/11/85 p 3, col 1), the defendant attacks the constitutionality of the aggravated harassment statute (P.L. Sec. 240.30). He also argues that the conduct for which he was convicted is not proscribed by Sec. 240.30 as construed in People v Smith, 89 Misc 2d 789 (App. Term, 2d Dept), cert den 434 U.S. 920 (1977). For the reasons that follow, defendant's argument is found to be without merit.

In People v Dupont, the defendant had been found guilty of two counts of

aggravated harrassment including one which was premised on his distribution of a magazine containing offensive material about the complainant with intent to harass or annoy the complainant. The First Department held that Sec. 240.30 was not meant to criminalize the mere distribution of printed material no matter how vexatious and that, were Sec. 240.30 read to prohibit such conduct, then it would be unconstitutional as violative of the First Amendment.

The Court finds that Dupont is factually distinguishable from the circumstances giving rise to the charges brought against the defendant. In the instant case, the defendant was convicted of aggravated harassment on the basis of evidence that he made numerous telephone calls to various individuals which the jury found were made "with intent to

harass, annoy, threaten or alarm" as set forth in the statute. In Dupont, the defendant was convicted simply and solely for distributing a publication containing offensive material about an individual.

The Court finds that defendant's conduct, as detailed during the course of the trial, "falls squarely within the hard core of the statute's proscriptions." (Dupont N.Y.L.J. supra, p 16, col 1 citing People v Smith, 89 Misc 2d 791). Although the defendant initially may have had as his purpose to present a legitimate complaint, the evidence was sufficient for the jury to find that the defendant was thereafter moved by the desire to simply harass. Given this, his conduct was prohibited by Sec. 240.30.

II. Right to a Speedy Trial and Jurisdictional Claims

In his Notice of Motion, the defendent

claimed that the People were not ready for trial within the time prescribed by CPL 30.30. In his supplementary affirmation, the defendant appears to have abandoned this argument. In addition, the defendent claims that he was not tried by information in that the corroborating affidavits had not been properly verified nor signed by an officer of Federation of Jewish Philanthropies, the complainant.

As far as the 30.30 claim is concerned, such an argument is untimely under CPL 170.30(2). In any event, as the defendant concedes, the People were ready for trial within the required period. Defendant's other argument--that he was not tried by information--is similarly without merit.

There is no question that the defendant was tried by information. When it was first learned that the original corroborating affidavits had not been

properly verified, the defendant--while insisting that he must be tried by information-- agreed that the conversion of the misdemeanor complaint would take place by filing verified corroborating affidavits signed by the witness before taking the stand. The defendant now argues that this procedure was defective since the trial had already commenced and the complaint had to be converted into an information prior to selection of the jury. However, the defendant was well aware that there was no information at the time the trial began. Nevertheless, he chose to continue the trial and have the complaint converted to an information by a mechanism suggested by him. Under these circumstances, the Court holds that the defendant waived the filing of an information prior to commencement of trial. To sustain the defendant's

contention that he did not waive the right to have the complaint converted to an information prior to the selection of a jury even though he insisted in continuing the trial would simply exalt form over substance. See People v. O'Connor, 63 NY2d 11, 15-16 (1984).

III. Propriety of Prosecution

The defendant alleges that he was originally charged with a felony, subjected to the indignity of arrest rather than being prosecuted by service of a summons and the entire matter taken to trial simply because the District Attorney of New York County sits on the Board of Trustees of the Federation of Jewish Philanthropies. In his judgment, the case should have been prosecuted, if at all, by another District Attorney.

The Court notes that the District

Attorney "has almost unfettered discretion in determining how and when to prosecute" and that "it may not act as the supervisor of the District Attorney, who is given free rein in his area of discretion." People v Williams, 120 Misc 2d 68, 78-79 (N.Y.C. Criminal Court 1983). There is nothing whatsoever on the record to indicate that the power of the District Attorney was illegally exercised. Moreover, the court papers indicate that any allegation of selective prosecution had to be disposed of prior to jury selection. There was no motion made in this regard and, for this added reason, the argument made herein must fail.

Similarly, the defendant could have moved for a change of venue if he deemed it appropriate. No such application was made. In light of this, defendant's belated argument in this regard is

unacceptable.

IV. Evidentiary Challenges and Exceptions to the Jury Charge

Defendant's motion papers set forth a number of evidentiary challenges as grounds for setting aside the verdict. The grounds pertain to the nature of telephone calls, as well as testimony of witnesses, introduced as evidence against the defendant.

It is a general principle of law that objections to evidence must be made at the time when the evidence is offered and a failure to object will be deemed a waiver of the objection unless the evidence was so prejudicial that the defendant was denied a fair trial. Richardson on Evidence, Sec. 537 (10th Ed. 1973); United States v Camporeale 515 F2d 184, 188 (2d Cir. 1975).

Here the Court finds that defendant

failed to make timely objections to the introduction of the evidence cited in his motion; consequently his objections are deemed untimely and therefore waived. Additionally, we do not find that the submission of this evidence to the jury was so prejudicial that defendant was denied a fair trial.

For similar reasons, his exceptions to the jury charge are deemed to have been waived. See People v Patterson, 39 NY2d 288, 294 (1976).

The Court has considered all the other points raised by the defendant and finds them unpersuasive. The motion to set aside the verdict is in all respects denied.

DATED: August 6, 1985

New York, N. Y. /s/

Frank Diaz

J. C. C.

IN THE APPELLATE TERM: FIRST DEPT.

STATE OF NEW YORK

COUNTY OF NEW YORK No._____

HARRY KATZ

v. Appellant

PEOPLE OF STATE OF NEW YORK

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Harry Katz, hereby appeals to the Supreme Court of the United States from the final order of the Appellate Term: First Dept. in New York State of July 9, 1987 affirming the judgment of conviction in Manhattan Criminal Court on March 6, 1985. Judge Richard Simons denied leave to appeal to N.Y. State Court of Appeals on August 20, 1987. This appeal is pursuant to 28 USC Section 1257(2)

Appellant Harry Katz is handling this appeal to the U.S. Supreme Court pro se.

Harry Katz Harry T. Katz

Appellant Pro Se

7600 Shore Front Pkwy.

Suite 12L

Rockaway, Queens, N.Y. 11692

Telephone: (718) 318-2563

AFFIDAVIT OF SERVICE

I Harry Katz, the appellant, do swear that on this day I sent out in the mail, with proper postage, three copies of the attached Notice of Appeal and Jurisdictional Statement to each of the following:

Clerk Court of Appeals
Eagle St. Albany, New York 12207

Clerk Appellate Term: First Dept.
60 Centre st. Room 401 N.Y. N.Y. 10007

Clerk Criminal Court City of New York
100 Centre St.
N.Y. N.Y. 10013

Manhattan District Attorney R. Morgenthau
One Hogan Place N.Y. N.Y. 10013

N.Y. Attorney General Robert Abrams
Capitol Albany, N.Y. 12224

Sworn to before me this 8 day of October 1987. signed: _____

Harry Katz

DEC 88

BEST AVAILABLE COPY